

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL)**

CRIMINAL CASE No. BVIHCR 2019/16

BETWEEN:

THE QUEEN

and

SEAN MARTIN

Appearances: Mrs. Tiffany R. Scatliffe Esprit & Mr. Kristian Johnson for the Crown
Mrs. Valerie R. Gordon & Mr. Michael Maduro for the Defendant

2021: May 22nd & 26th

RULING ON ADMISSIBILITY OF VIDEO EVIDENCE

[1] **FLOYD J:** This is an objection as to the admissibility of video evidence in the course of this trial. The Defendant is charged with murder contrary to section 148 of the Criminal Code 1997. The trial began on 18th May, 2021.

THE FACTS

[2] The Defence has questioned the ability of the witness, Deyling Castro, to testify as to what he observed on a video recorded on his IPAD. Deyling Castro is the brother of the deceased victim in this case. He testified that on the date of the murder, he received a phone call telling him that his brother was dead. He immediately travelled to the scene where he found the body of his deceased brother, his mother in tears and the police investigating. He made inquiries in the area and eventually attended at the home of one of his brother's friends, Rondell. He spoke to Rondell, who was with

his brother at the time of the shooting. As the brother of the deceased, Deyling Castro is arguably not objectively neutral in this case. Never the less, the information he received caused him to go to another person's residence. That person is known as Gabo. He did not go to Gabo's house the same day but it was soon thereafter. Gabo's house has cameras on the exterior of the building. These cameras face the short cut from Purcell to a local Bakery. The video recording of the date and time in question was located on the equipment and copied on to an IPAD belonging to the witness. In reference to the video that was recovered, the witness made the comment that the video found him. He confirmed that he did nothing with the video to alter it. At this point, the objection was raised by defence counsel and the testimony halted. Thereafter, oral and then written submissions were made by both Crown and Defence.

THE POSITION OF THE PARTIES

- [3] Defence Counsel objected to the admission of this video evidence based on this witness not being the equipment owner nor being present when the original recording was made. The extraction of the video could not be adequately confirmed and the operational functionality of the equipment had not been confirmed. The date and time of the recording were not confirmed. There was a total lack of verification. The equipment owner, Garvin Vanterpool, aka Gabo, did not provide a statement nor testify. It was submitted that the prejudicial effect of the evidence outweighed its probative value and the court was invited to view the video recording in question to satisfy itself.
- [4] As to whether the witness could testify about what was seen on the video recording, the Crown's position was that he could. The evidence should be admitted as it was a matter of weight. Photographs and visual recordings are real evidence with significant probative value. In the absence of evidence to the contrary, mechanical instruments are presumed to be working normally. The court was directed not only to the statement of Deyling Castro, found in the court file, but also to the statement of the investigating officer, D/S Bakker. That officer attended with a search warrant on 22nd August, 2018 at the residence of Garvin Vanterpool. He found the video recording equipment to be functioning properly and to be displaying visual images of the scene captured by the exterior cameras. However, the footage for the date and time in question had been overwritten by the system.

ANALYSIS

- [5] As set out in the case of **Taylor v Chief Constable of Cheshire**¹, evidence such as this, is not hearsay. It is direct evidence of an event. It is evidence of what was seen at a particular place at a particular time. In that case, just because the video recording was not available at trial, did not render the evidence of the police witness inadmissible. It was a matter of weight and reliability. The date was confirmed and the machine it came from was confirmed, just as in this case.
- [6] The court in **Taylor** held that it was no longer the case that only the best evidence should be admitted. The court referred to Lord Denning's words in the case of **Garton v Hunter**², confirming that "nowadays ... we admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility".
- [7] The court in **Taylor** found no distinction between a direct view of an incident and a view of the same incident on a recording. "He who saw may describe what he saw" as long as it is relevant and provided that which is seen on the camera or recording is connected by sufficient evidence to the alleged actions of the accused at the time and place in question. The court cautioned, however, that the witness and the reliability of his evidence will depend on an assessment of all relevant considerations, including the clarity of the recording and its length.
- [8] The court in **R v Maqsud Ali**³, referred to the value of audio recordings. Although there is a requirement of proving the accuracy of the recording, so long as it is relevant, it will be admissible. It must be regarded with caution and assessed in light of all of the circumstances of the case, but it will be admissible. If the evidence is lost, it does not become inadmissible, it becomes subject to comments as to weight and persuasiveness, which naturally flow from its loss. In this way, the same can be said of the recording in this case. Without the owner of the video equipment to testify as to the equipment on the date in question and the video itself, the recording remains. The weight it is to be given, however, becomes a matter for debate.

¹ [1987] 1 ALL ER 225

² [1969] 1 ALL ER 451, [1969] 2 QB 37

³ [1965] 2 ALL ER 464, [1966] 1 QB 688

- [9] The court in **Gubinas and Radavicius v H. M. Advocate**⁴, held that a person responsible for the operation of a recording system could certify that visual images and sounds recorded on a particular device were of or related to events at a particular time or place. Even more importantly, the court went on to say that individuals recording events on cameras or mobile phones could speak to doing so. “Even without anyone speaking to the recovery of the images, a witness to the scene could legitimately be asked if what was shown in images produced was of the relevant event. The fact finder could infer from that, that someone, perhaps unidentified, recorded the images at the time. That might be sufficient evidence of provenance.” That appears to be the case with Deyling Castro. He is on the scene, aware of the recording being made, and can speak to the images captured. The question then becomes what the fact finder can make of the images.
- [10] The court in **R v Nikolovski**⁵, confirmed the value of videotape evidence generally when, at **para 22**, it held that “so long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator. It is relevant and admissible evidence that can by itself be cogent and convincing evidence on the issue of identity...In the course of their deliberations, triers of fact will make their assessment of the weight that should be accorded the evidence of the videotape just as they assess the weight of the evidence given by *viva voce* testimony”. In this case, the video evidence is clear and detailed. The location and the scene depicted are identifiable. The dates and times are noted and set out on the videos.
- [11] The reference by Counsel for the defence to **s. 58 (2)** of the **Evidence Act** is helpful. However, it confirms that the document is presumed to be admissible unless it is shown to be inaccurate or there are reasonable grounds for believing inaccuracy or there is an indication the equipment was not operated properly. There is no such indication here. Indeed, the recording device used can be confirmed by the witness, Deyling Castro, as operating normally. It is his IPAD.

⁴ [2017] HCJAC 59, 2018 JC 45, 2017 SLT 1017, 2017 SCCR 463

⁵ 111 CCC 3d 403, 1996 SCJ No. 122

- [12] Similarly, the document Defence Counsel referred to regarding the retrieval of video evidence, **Home Office Publication No 66/08**, is helpful but it does not affect the witness, Deyling Castro, as he was not a technician employed to carry out digital extractions. Indeed, this was not an extraction in the purest sense. It was a recording carried out by a lay person. The methods outlined in the document are expected to be used by professionals, as other technician witnesses in this case have actually followed. Mr. Castro's situation was different.
- [13] None the less, the court must be satisfied as to the nature of the recording. Deyling Castro can confirm the video recording made on his IPAD. He was aware of the cameras and equipment locations. He had received information about a person of interest from friends who were present when the shooting occurred. He knew of the date and estimated time of the event. The location of the video cameras and the area depicted, appear to be close to the crime scene and follows one of several routes already referred to by other witnesses to and from the scene. The person depicted in the video appears to be someone generally described by other witnesses previously. The date and time on the video screen relate to the date and time for this incident. Therefore, it is clear, these videos have relevance. Deyling Castro was in possession of the videos and he passed them on to the police.
- [14] I am further guided by the fact that the police attended the video equipment location with a search warrant. They examined the equipment as well as the camera views and locations. That assisted in confirming the content of the videos and confirmed the location of the videos. However, the date and time in question was found to have been overwritten. Police efforts, as confirmed in the statement of the investigating officer, D/S Bakker, were therefore made to confirm the video footage. The loss of the original video increased the probative value and the significance of the video evidence. This, however, must be balanced with the prejudicial effect on the Defendant.
- [15] I am further satisfied by the great detail found in the videos when I reviewed them as it relates to dates, times, camera numbers, calendars depicted and running times. The date of 10th August, 2018 was clearly visible on the screen. The four cameras selected were check marked on the right side of the screen. The screen was split into four camera views. The running time was visible. The date was also visible in the upper left corner of each camera screen. A calendar on the right side of the

screen was visible, with a range of 4th – 13th August, 2018 indicated and day No. 10 encircled. Cameras 1, 2, 4 and 5 are confirmed. All of this supported what was being depicted on the witness' IPAD video. It appeared to successfully relate to the cameras and the equipment location.

- [16] In totality, provenance and authenticity were therefore established through the witnesses Castro, and the investigating officer, Bakker.
- [17] I agree that some confirmation of date and time was necessary but it need not come from the equipment owner. The owner is not required to prove the equipment was functioning properly. The issue of manipulation of the video evidence, as raised by the defence, could be addressed by the witness Castro and the investigating officer Bakker. The latter received the video into his possession from the former. That process would assuage any fears of manipulation and lack of validity.
- [18] Although the **Maqsud Ali** case confirms the evidence must be regarded with caution and assessed in light of all of the circumstances of the case, that is a matter for the jury to consider in assessing its evidentiary value or weight. It is evidence to be viewed as any other evidence, subject to the same considerations.
- [19] The court held that if a tape is lost, the evidence does not become inadmissible. It becomes subject to comments as to weight and persuasiveness which naturally flow from its loss, or as in this case, from its creation.
- [20] The **Gubinas** case tells us that individuals like Deyling Castro, recording events on cameras or mobile phones, can speak to doing so. Further, even without anyone speaking to the recovery of the images, a witness to the scene could legitimately be asked if what was shown in the images produced was of the relevant event. The fact finder could infer from that, that someone, perhaps unidentified, recorded the images at the time. The question then becomes what the fact finder can make of the images as presented.

[21] Mr. Castro's statement was cumbersome and difficult to follow, at one point it indicates his father used his IPAD to record the videos, and at another it says Deyling Castro recorded the videos. It does confirm, however, that the videos were sent by him to his IPHONE, from where he eventually sent them on to the investigating officer. It appeared from his statement that if Deyling Castro did not record the videos himself, he was at least present when the videos were recorded. The manner in which these videos were obtained was unusual and certainly not ideal. However, I am satisfied that, in the end, the evidence is admissible. It is relevant and its probative value outweighs any prejudice to the Defendant. The weight to be attributed to this evidence is, however, a matter to be determined by the jury, based on all of the surrounding circumstances of the obtaining of the evidence, and in conjunction with all the remaining evidence. The video evidence will therefore be admitted.

**Richard G. Floyd
High Court Judge**

By the Court

Registrar